

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SCOTT BEVER

Claimant

VS.

HEINZ PET PRODUCTS

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 247,016

ORDER

Respondent appeals the April 24, 2002 Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded a permanent partial general disability of 85.3 percent as a result of injuries suffered on or about May 12, 1998. Respondent contends that claimant did not prove his injuries occurred as a result of that incident. Respondent further contends that claimant should be denied a work disability in this matter if it is found compensable, as claimant's loss of employment stems from his termination on July 1, 1999, resulting from several personnel policy disputes between claimant and respondent. Respondent, therefore, alleges that claimant's termination was for cause, thus precluding a work disability. The Appeals Board (Board) held oral argument on October 23, 2002.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Patrick R. Barnes of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record with the addition of Exhibit 6 from the Clausen deposition and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date alleged?
- (2) What is the nature and extent of claimant's injury and disability?
- (3) Is respondent entitled to a credit for a preexisting disability and impairment pursuant to K.S.A. 1997 Supp. 44-501(c) or is claimant, instead, entitled to a K.S.A. 44-510a (Furse 1993) credit for his preexisting injury?
- (4) Did the Administrative Law Judge err in excluding certain exhibits, specifically Exhibit 6 from the Clausen deposition, Exhibit 6 from the Zimmerman deposition and Exhibit 6 from the Langston deposition?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be modified to grant respondent a credit under K.S.A. 1997 Supp. 44-501(c) for an 18 percent permanent partial functional impairment. In all other regards, the Award of the Administrative Law Judge is affirmed.

Claimant began working for respondent in December of 1972. He originally suffered an injury to his back in 1994, settling that workers' compensation claim for a functional impairment with no work disability. After that incident, claimant returned to work for respondent without restrictions, performing his regular duties.

On May 12, 1998, while carrying an 18-pound bag of dog food in each hand, claimant felt a sharp, stabbing pain in his low back. This injury was reported to claimant's team leader and he was provided medical treatment, involving several trips to the emergency room. Claimant underwent conservative treatment over a period of several months.

Claimant's employment with respondent was terminated on July 1, 1999, as a result of a dispute regarding working overtime and several clashes with coworkers and management. Claimant contends he was physically unable to perform the overtime work, although respondent's witnesses indicated claimant failed to advise them that he was having a problem. Respondent contended that claimant's regular weekly half day of vacation taken from the job was taken in order for claimant to avoid cleanup, which he did not enjoy.

After his termination, claimant underwent an MRI on July 14, 1999, which displayed a large posterior disc herniation at L4-L5. This MRI, when compared to an MRI performed in September of 1994, showed distinct differences. The 1994 MRI did not show a disc herniation at L4-L5, but instead mentioned small disc bulges in the L3-L4, L4-L5 and L5-S1 regions.

After undergoing conservative care, including epidural injections, claimant underwent a foraminotomy with John D. Ebeling, M.D. Dr. Ebeling found a large subligamentous herniation at L4-L5 and also documented a central and left-sided L4-S1 herniation, as well as a right side L5-S1 herniation.

Claimant underwent postoperative care from numerous physicians. However, the only physician to testify in this matter was Daniel D. Zimmerman, M.D. He examined claimant on February 27, 2001, at the request of claimant's attorney. He had also examined claimant on May 17, 1997, after the original 1994 accidental injury. Dr. Zimmerman diagnosed claimant with a disc herniation at L4-L5, which he described as large, which led to the surgical repair. He testified that there were several changes between the 1994 and the 1999 MRIs. This indicated to him that the accident of May 12, 1998, had caused claimant additional injury and claimant's symptoms were not merely a continuation of the original 1994 accidental injury.

Dr. Zimmerman assessed claimant a 33 percent impairment to the body as a whole, based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He restricted claimant to lifting no more than 10 pounds occasionally, 5 pounds frequently, advising that he only occasionally bend at the waist, with limited bending, stooping, squatting, crawling and kneeling activities. He recommended claimant be seated for no more than 20 to 30 minutes at a time before changing positions. He further recommended claimant not be on his feet or walking more than 15 to 20 minutes at a time before he was given the opportunity to sit down or otherwise get off his feet.

In his May 1997 evaluation following claimant's 1994 accidental injury, Dr. Zimmerman concluded that claimant had suffered an 18 percent impairment to the body as a whole. That evaluation was performed pursuant to the AMA *Guides* (3d ed. rev.), which was the appropriate version to be utilized for a 1994 accidental injury. He did testify that the 18 percent impairment would have been the same had he used the AMA *Guides* (4th ed.).

Dr. Zimmerman was provided a task analysis prepared by vocational expert Bud Langston. In reviewing the task list, Dr. Zimmerman determined claimant was incapable of performing seventeen of the eighteen tasks contained on the list. This results in a task loss on a time-weighted basis of 97 percent.

Claimant was referred by the Administrative Law Judge to Lynn A. Curtis, M.D., for an independent medical examination. After undergoing an extensive review of claimant's medical history, including numerous medical reports, Dr. Curtis found claimant to have suffered a 35 percent permanent partial general disability on a functional basis. He opined that claimant's preexisting impairment from the 1994 accidental injury was 5 percent according to the DRE model of the *AMA Guides* (4th ed.). Dr. Curtis did not testify, but his report was part of the record. There is no indication that Dr. Curtis was provided a task loss analysis for his consideration.

After being terminated, claimant sought employment until approximately December 1, 2000, when he obtained a job with PTMW, working 20 hours a week at \$8 per hour. This employment continued through approximately September 1, 2001. On approximately September 15, 2001, he obtained employment with Kansas Bumper, driving a delivery truck, working 14 to 18 hours a week and earning \$7.50 per hour.

At the time of the regular hearing, claimant described in detail his attempts at obtaining employment after being terminated from respondent. This job search history involved the period from July 1, 1999, his termination, through the February 21, 2002 regular hearing. Claimant's testimony included descriptions of several jobs which he had attempted to obtain, but was physically unable to perform. Claimant's job search activities are not listed in significant detail. The Administrative Law Judge found claimant's job efforts to be "abysmal". The Judge went on to find that claimant had not put forth a good faith effort to find employment and, therefore, under K.S.A. 1997 Supp. 44-510e, imputed a post-injury wage to claimant.

The only wage opinion contained in the record is that of Mr. Langston, who testified that claimant had the ability to earn \$7.50 per hour, which is very close to the wages claimant actually earned after the termination. The medical records contained in evidence disclose no health care professional limiting claimant to part-time work.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹

In order for a claimant to collect workers' compensation benefits under the Kansas Workers Compensation Act, he must suffer accidental injury arising out of and in the course of his employment.

The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the

¹ See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.²

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service.³

The Board finds that the description of the accident provided by claimant is credible. The Board, therefore, finds that claimant has proven he suffered accidental injury arising out of and in the course of his employment on May 12, 1998.

K.S.A. 1997 Supp. 44-510e defines permanent partial general disability as:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Respondent contends that claimant should be denied permanent partial general disability in excess of his functional impairment, as K.S.A. 1997 Supp. 44-510e goes on to state:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Here, claimant returned to work at an accommodated position with respondent after the injury. Respondent contends that claimant's termination for cause should preclude his entitlement to a work disability, as, had claimant not been fired, he would have continued working for respondent at a comparable wage. That contention, however, is not supported by the evidence. After claimant's termination, he underwent an MRI on July 14, 1999. The MRI discovered specific disc problems, including a large herniation at L4-L5 for which claimant underwent surgery with Dr. Ebeling. After the surgery, claimant was able to return to employment, but with very specific restrictions. Those restrictions set forth in the

² *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

³ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

testimony of Dr. Zimmerman would have precluded claimant from returning to any employment with respondent without significant light-duty accommodation. Respondent's representative, Donald Clausen, who was claimant's supervisor on the date of the accident, acknowledged that respondent did not provide permanent light-duty work for a production job. Therefore, claimant would have been unemployed regardless of the termination incident due to respondent's inability to accommodate claimant's restrictions. The Board, therefore, finds that claimant is entitled to a permanent partial general disability under K.S.A. 1997 Supp. 44-510e.

However, in considering claimant's entitlement to a permanent partial general disability, the Board must also look to the policies set forth by the Kansas Court of Appeals in *Copeland*,⁴ which holds for the purpose of the wage loss prong of K.S.A. 1997 Supp. 44-510e, a worker's post-injury wage should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

In this instance, the Administrative Law Judge found, and the Board agrees, that claimant did not put forth a good faith effort to obtain employment. Claimant found only two part-time jobs, working 20 hours per week or less. Claimant's contacts with potential employers were limited over a significant period of time and, in the Board's opinion, did not constitute a good faith effort. Therefore, the Board will impute a wage pursuant to K.S.A. 1997 Supp. 44-510e. The only opinion contained in the record regarding claimant's ability to earn wages is that of Mr. Langston, who found claimant capable of earning \$7.50 an hour. The Administrative Law Judge imputed a full-time, 40-hour-per-week wage to claimant of \$300, resulting in a wage loss of 73.5 percent.

When averaging claimant's 97 percent task loss with the 73.5 percent wage loss, claimant is entitled to an 85.3 percent permanent partial general disability.

A dispute arose in three depositions regarding the admissibility of certain exhibits. Exhibit 6 to the deposition of Donald Clausen was a June 28, 1999 note from Mr. Clausen regarding an incident between claimant and coworkers. Claimant objected to this note as involving hearsay. Apparently, the information contained in the note was not information obtained first hand by Mr. Clausen, but rather information which was reported to him by witnesses to the actual incident which Mr. Clausen did not witness. The Board acknowledges that this would constitute hearsay. However, hearsay is admissible in workers' compensation litigation.⁵ The Board reverses the Administrative Law Judge on this issue. But the Board will give little or no weight to this hearsay evidence.

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁵ K.A.R. 51-3-8(c).

The second disputed exhibit is Exhibit 6 contained in the deposition of Dr. Zimmerman. This involves a task list prepared by respondent for which Dr. Zimmerman was asked to express an opinion regarding claimant's ability to perform those tasks. The task list was not testified to by any witness for respondent, and claimant did not have the opportunity to review or consider the task list. Therefore, claimant's objection to the task list due to a lack of foundation was appropriate.

Finally, the Board must consider the admissibility of Exhibit 6 to the Langston deposition, which consists of the June 12, 1995 report of Sergio Delgado, M.D., as well as Dr. Delgado's notes from June 22, 1995 and June 27, 1995. This report was objected to as being in violation of K.S.A. 44-519 (Furse 1993). K.S.A. 44-519 (Furse 1993) prohibits the admissibility of medical reports absent a stipulation or absent the testimony of the authoring doctor. In this instance, as Dr. Delgado did not testify, his report and medical records under K.S.A. 44-519 (Furse 1993) would be inadmissible.

The Board, therefore, finds that the determination by the Administrative Law Judge to exclude Exhibit 6 from the Zimmerman deposition and Exhibit 6 from the Langston deposition was appropriate and is affirmed.

K.S.A. 1997 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Respondent contends it is entitled to a setoff of the preexisting functional impairment of 18 percent as determined by Dr. Zimmerman. Claimant contends that the appropriate setoff should be under K.S.A. 44-510a (Furse 1993), which states in pertinent part:

If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury.

The Board, in considering both K.S.A. 1997 Supp. 44-501(c) and K.S.A. 44-510a (Furse 1993), finds that the appropriate deduction in this instance is that contained in K.S.A. 1997 Supp. 44-501(c).

The Board must next consider whether the preexisting functional impairment determined by Dr. Curtis of 5 percent to the body as a whole or the preexisting functional impairment of 18 percent by Dr. Zimmerman is appropriate. The Board finds Dr. Zimmerman's 18 percent functional impairment to be the most credible. Dr. Zimmerman had the opportunity to examine claimant both after the 1994 accident and after the 1998 accident. Dr. Curtis, on the other hand, only had the opportunity to review medical records from claimant's injuries from the 1994 accident. In determining claimant's preexisting functional impairment, Dr. Zimmerman utilized the *AMA Guides* (3d ed. rev.), which was the mandated version of the Guides to be utilized for a 1994 accidental injury. He further discussed the significance of using the *AMA Guides* (4th ed.), which is the version which was mandated as of the May 1998 accidental injury. In considering both editions, Dr. Zimmerman found the 18 percent whole body impairment to be appropriate. The Board finds that Dr. Zimmerman's opinion of an 18 percent preexisting functional impairment is the most credible.

The Board, therefore, modifies the Award of the Administrative Law Judge to include in the record Exhibit 6 from the Clausen deposition and to grant respondent an 18 percent permanent partial functional credit under K.S.A. 1997 Supp. 44-501(c), but in all other regards affirms the Award of the Administrative Law Judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an Award is granted in favor of the claimant and against the respondent for injuries suffered on May 12, 1998, for an 85.3 percent permanent partial general body disability.

Claimant is entitled to 41 weeks temporary total disability compensation at the rate of \$351 per week totaling \$14,391, followed by compensation at the rate of \$351 per week for an 85.3 percent permanent partial general body disability, making a total award as limited by K.S.A. 44-510f (Furse 1993) of \$100,000.

Respondent is thereafter entitled to an 18 percent credit on a functional basis pursuant to K.S.A. 1997 Supp. 44-501(c) which computes to a functional award of \$24,577.02. Claimant is, therefore, entitled to a total award after the reduction of \$75,422.98.

As of October 24, 2002, there would be due and owing to claimant 41 weeks temporary total disability compensation at the rate of \$351 per week totaling \$14,391, plus 173.88 weeks permanent partial general disability compensation at the rate of \$351 per week totaling \$61,031.98. As of the time of this Award, the entire amount would be due and owing in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Patrick R. Barnes, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation